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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA AND BRIEF IN SUP-
PORT THEREOF.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States and the Associate Justices of the Supreme
Court of the United States:*

Orman W. Ewing respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia, to remove therefrom, for review here, the record in the case No. 8308, wherein petitioner is appellant and the United States of America is appellee, and in which case that court announced its opinion

under date of December 1, 1942 (R. 110) affirming the judgment of the District Court of the United States for the District of Columbia.

Summary Statement of Matter Involved.

Petitioner was indicted on November 4, 1941 for the crime of rape. The offense was alleged to have been committed on October 26, 1941 and petitioner was arrested on the night of October 27th. He was denied bond and has been confined in jail since his arrest. After a trial before the Honorable James W. Morris and a jury in the United States District Court for the District of Columbia, petitioner was convicted. The judgment and sentence of the Court was confinement in the penitentiary for a period of 8 to 24 years (R. 22). The court below affirmed the judgment and sentence (R. 124). Petitioner has at all times denied the charge and has consistently maintained his innocence.

During the course of the trial, a defense witness was asked questions on cross-examination about a visit made by this witness to the home of the mother of the *complaining witness* in Utah. The interrogation developed that the witness was a friend of the mother of the complaining witness and the government sought to establish that the purpose of the visit was to discuss the subject matter of the pending trial. On direct examination, there was no evidence developed with respect to this visit. However, on cross-examination, the government asked:

Q. Now in that conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say Yes?

A. No, she didn't. (R. 32.)

Notwithstanding the aforesaid denial, the government called, as the last witness in the case, in rebuttal, the mother

of the complaining witness and, after redeveloping the visit to Utah, the following colloquy occurred:

Q. On that occasion, did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter," and did she say, "I do believe it?"

A. Yes, she did.

Q. Did she further say on that occasion, "He is facing the electric chair, and I have got to be on his side?"

A. Yes. (R. 32, 33.)

It is with respect to this line of testimony, and the propriety thereof, that the basic question of law underlying this petition is raised. Error was assigned and the court below considered the question. The majority concluded that the admissibility in evidence of the opinion of the witness as to the guilt or innocence of the accused was proper. The Chief Justice disagreed.

Further, the prosecutor, without any basis in the indictment or in the evidence, cast grave moral aspersions by seeking through inference to blacken the character of petitioner. On the *voir dire*, the government by innuendo sought to connect petitioner with a person indicted for sending obscene literature through the mails (R. 39). At the trial this program was continued by asking a defense witness if he and petitioner had not discussed having a party with "some whiskey * * * and some of the girls" on the night of the alleged crime. The witness denied such a conversation (R. 115). The court below considered this to be of "doubtful propriety" but passed over it as being non-prejudicial (R. 115).

Statement of the Case.

Complaining witness Betty Ruth Crandall, was 19 years of age and reached her 20th birthday two weeks after

the alleged occurrence, Oct. 26, 1941. She testified that she came to Washington from Provo, Utah, on Oct. 12, 1941 to take a position with the government. Upon arrival in Washington she went to live temporarily at the Whitestone Inn, a rooming house at 1101 16th St. N. W. as the guest of Miss Hester Chamberlin who had been acquainted with her mother in Provo, Utah, and Miss Crandall occupied the bedroom of Miss Chamberlin's office apartment and Miss Chamberlin slept on a cot in the office or other room of the apartment. The testimony showed that Miss Chamberlin and petitioner jointly owned the Whitestone Inn, which Miss Chamberlin managed and at the time petitioner was constructing an addition to the building and also using Miss Chamberlin's office apartment as a construction office.

Miss Crandall, the prosecutrix, testified that on Oct. 25th she went out with a friend,—Robert A. Payne, a roomer at the Whitestone; that they returned to the Whitestone at about 12:30 and at about 1:15 she went to Miss Chamberlin's apartment and there saw the petitioner and Miss Chamberlin having a drink and petitioner offered her a drink, which she refused. She testified she remained there for about five minutes and then went to the bedroom and retired in her panties and a housecoat and after she had been in bed for twenty or thirty minutes the petitioner came into the room and against her will forced her to submit to sexual intercourse. She stated that petitioner threatened to kill her and threatened to "throw her in the hole." She was referring to the excavation for the annex to the building. She admitted that the windows of the apartment were ground level and were permanently barred (Orig. R. 759). She stated that she did not scream (Orig. R. 838) although there were many people in the house (Orig. R. 813); that her clothing was not torn (Orig. R. 835) nor did she have any marks or bruises on her body (Orig. R. 838) and that she went to sleep following the alleged occurrence

and slept until 8:30 a. m. (Orig. R. 819). The testimony also showed that no complaint was made until twenty-four hours later and then such complaint was made by Mr. Payne after getting the prosecutrix out of bed on the night following the alleged occurrence (Orig. R. 988).

The petitioner testified on his own behalf that he worked on his books and records in the office or pine room of the apartment (the room adjoining the bedroom where the complaining witness slept) until after 1:00 a. m. of the morning in question. He testified that he called his home after one o'clock and told his wife that the construction crew were going to work Sunday, Oct. 26, and he would have to be there early to get the men started and would remain at the Whitestone overnight. He testified he had been working on his records in Miss Chamberlin's Apartment and that she and the petitioner drank a highball and were drinking a second when the complaining witness entered after 1:30 a. m. and joined with them in having a highball. He testified he left the apartment just before 2 o'clock to stop a plumbing leak on the third floor and retired about 3 a. m. in a vacant room across a hall from the pine room where Miss Chamberlin was sleeping. Petitioner consistently denied any intercourse with the complaining witness.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under (A) Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and (B) the Act of March 8, 1943, and the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, pursuant thereto.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on December 1, 1942 (R. 124), affirming the judgment of the United States District Court for the District of Columbia.

Petition for rehearing was filed on December 8, 1942 (R. 124-132); opposed December 9, 1942 (R. 132); and denied December 11, 1942 (R. 133).

While the errors herein complained of were assigned on appeal, there was no objection made or exception taken thereto at the trial. This, however, was cured by the trial court (Mr. Justice Morris) who, under the power granted in 28 U. S. C. A. 391, deemed it proper to consider them (R. 31, 32).

Questions Presented.

Is it not prejudicial error, destructive to a defendant in a criminal trial in a Federal court, for the trial court to permit a witness for the Government to testify that, in a conversation with one of the defendant's witnesses, the latter had expressed the opinion that the defendant was guilty of the crime for which he was on trial? Collaterally, is not such prejudice so serious as to deprive the defendant of *any trial at all* when the Government witness so testifying is the mother of the complaining witness in a rape case?

In a trial for the crime of rape, is it not substantial prejudicial error for the Government to cast, through questions put to the panel and to witnesses, aspersions on the character of the accused, when there is no basis therefor under the evidence?

Reasons Relied Upon for Allowance of Writ of Certiorari.

1. The United States Court of Appeals for the District of Columbia has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court of the United States for the District as to call for this Court's power of supervision.

2. The court of appeals has decided an important question contrary to local law. *Yeager v. U. S.*, 16 App. D. C. 35

(1900) had always been the law of the District of Columbia until the decisions below.

3. The court of appeals has sanctioned a rule of evidence that invades the province of the jury.

4. The opinion of the court of appeals misconstrues the law as to prejudicial evidence improperly injected in a criminal case by the prosecution.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8308, Orman W. Ewing, appellant versus United States of America, appellee, and that the judgment of the court below be reversed by this Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just.

JAMES J. LAUGHLIN,
Attorneys for Petitioner.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

ORMAN W. EWING,

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Petitioner,

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion below, announced December 1, 1942, appears in the record at pages 69 to 82. Rehearing was denied December 11, 1942.

The memorandum opinion of the District Court will be found in the record at pages 29 to 67.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. Also the Act of March 8, 1934, and the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, in pursuance thereof.

Statement of the Case.

A concise statement of the case containing, as the petitioner believes, all that is material to the consideration of the questions presented is set forth in his petition and is not repeated here.

Specification of Errors to Be Urged.

The court erred:

In affirming the judgment of the District Court.

In entering judgment for the United States.

In holding that a trial court can receive in evidence in a criminal trial the opinion of a witness as to the guilt of an accused.

In failing to hold that prejudicial error resulted when improper testimony was offered to the jury.

ARGUMENT.

I.

Opinion Evidence as to the Guilt or Innocence of an Accused Cannot Be Received in a Criminal Trial.

If the opinion of the majority in this case is permitted to stand then there has been approved for the federal courts a rule of evidence that is fraught with the gravest danger. Certainly under such a course of procedure no accused can be accorded the constitutional guaranty of a fair and impartial trial.

- * In the instant case a witness, Hester Chamberlin, was sworn on behalf of the petitioner. Although nothing was asked on direct examination about a visit to the State of Utah she was asked on cross-examination about such a visit and about a conversation with Mrs. Crandall (mother of

the complaining witness). The district attorney went beyond the scope of the direct examination and asked this:

Q. Now in that conversation, did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say Yes?

A. No, she didn't.

(R. 32.)

Therefore it will be seen that as she denied the damaging statement or admission the government was concluded by the answer and could not contradict her. *Attorney General v. Hitchcock*, 1 Exch. 91 (1847). See also Greenleaf on Evidence, Section 461 f (citing *Atty. Gen. v. Hitchcock*). Yet notwithstanding the accepted rule the government was permitted to contradict the witness on a collateral matter. The government called Mrs. Crandall (mother of the complaining witness), and she was questioned concerning the interview as follows:

Q. On that occasion did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter," and did she say, "I do believe it"?

A. Yes she did.

Q. Did she further say on that occasion, "He is facing the electric chair and I have got to be on his side?"

A. Yes.

(R. 32, 33.)

It is difficult to understand how the court below could justify such an invasion of the function of the jury. And we protest with all possible vigor such a departure from the accepted and usual course of judicial proceedings. That it was prejudicial and damaging can admit of no dispute. The district attorney knew that the reception of such evidence would be fatal when it is considered that Miss Chamberlin testified that she slept in a room adjoining the room where the offense is alleged to have taken place. There-

fore if the jury believed that she believed the petitioner to be guilty the jury could well infer that she either saw him enter the room occupied by the girl or looked through the keyhole and saw him committing an act of immorality. And it must be remembered that Miss Chamberlin denied that she made the statement attributed to her. Furthermore it must be considered that there was a witness present in the courtroom (and not called for reasons never explained to the petitioner) who was present at the conversation in Utah and would have testified that the statement was not made (Record 89-91).

We are not unmindful of the grave danger confronting an accused charged with such a serious crime and involving a girl young in years. Prejudice is necessarily great and for that reason—if no other—there is a duty on the part of the trial court to protect his rights at all stages. Trial judges too are often carried away with sympathy for the girl. (In this case the girl was 20, the accused past 55.) And that prejudice often carries over and lodges itself in the hearts of the reviewing court. Yet the words of Judge Jones in his dissent in the case of *Johnson v. United States*, 129 Federal (2nd) 954 CCA 3 (1942) now before this court on a writ of certiorari have application here. Judge Jones said:

“It may very well be that the defendant in this case is guilty of the offenses precisely as charged by the government, but the appropriate function of a reviewing court is to determine whether applicable legal standards were fully and fairly complied with at the trial in respect of the defendant’s substantial rights. Nor may the notoriety of a particular defendant ever dissuade from a dispassionate inquiry into the merit of his timely complaint. While, quite understandingly, any question as to the fairness of a trial is of immediate and direct concern to the convicted defendant, yet its wider importance lies in its significance to the

public at large. The rights of all are adversely affected when the rights of one are substantially impaired or disregarded. And this is especially true if the impairment or want of regard transpires under legal forms."

In the *Johnson* case a strong reason for seeking certiorari was the action of the trial court in permitting the accused to be questioned on collateral matters and going beyond the scope of the direct examination. And it is most interesting to note that this Court agreed to review this case and it will be reached for argument perhaps by the time this petition is filed.

It is obvious that the Court below had great difficulty in justifying the admission of the objectionable evidence. That will be seen when it is realized that 7 pages of the opinion of the majority are devoted to this point. Then it will be seen that the Chief Justice of the court below correctly stated the law when he stated that the evidence was not admissible. We find this from the Chief Justice:

"I think it was error to have allowed a witness for the government to testify that, in a conversation with one of the defendant's witnesses, the latter had expressed the opinion that the defendant was guilty of the crime for which he was on trial. When Miss Chamberlin, defendant's principal witness, was on cross-examination the District Attorney asked her whether, on a visit to Utah, she had called on the mother of the prosecutrix, and conversed with her. She replied she had. She was then asked:

"Question: Now in that conversation, did Mrs. C—ask you if you thought Ewing was guilty, and didn't you say Yes? Answer: No, she didn't."

At the close of the defendant's evidence Mrs. C—was called and sworn and was asked:

"Question: On that occasion, did you look at Miss Chamberlin and point and say this: 'Do you believe

that Mr. Ewing is guilty of raping my daughter,' and did she say, 'I do believe it'? Answer: Yes, she did.

I am unaware of any rule, old or new, which permits receipt in evidence of a witness's opinion as to the guilt or innocence of the accused. I have always understood that question to be exclusively for the jury and that any invasion of their right to determine the question solely on the facts was improper, whether coming from the judge or from a witness. The statement attributed to Miss Chamberlin could have been treated by the jury only as substantive evidence of her belief of defendant's guilt, and considered in that light I think there can be no doubt of its inadmissibility. However far some recent cases may have gone in allowing such evidence for purposes of contradiction, it is clear that that was not its purpose here, nor do I think the court could have found a phrase to limit its use to that purpose. For as Mr. Justice Cardozo said in *Shepard v. U. S.* 290 U. S. 96, 104:

'Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds.'

I am therefore unwilling to accept, as a rule for the future, either the conclusion of the majority in this respect or the reasoning on which it is sustained''.

We submit that the opinion of the Chief Justice correctly states the law. He agreed in the result because there was no objection and exception in the court below. However that did not prevent the court from considering it. See *Glasser v. United States*, 315 U. S. 60. In the *Glasser* case the objectionable matter was not raised in the trial court—not even on the motion for new trial. It was not even mentioned in the grounds stated in the notice of appeal. It was raised weeks later in the brief filed in the circuit court of appeals. But it was considered by this Court.

There is authority in abundance as to the right to go beyond the scope of the direct examination. There is also ample authority as to the error arising when a witness is contradicted on a collateral matter. However it is necessary to narrow our search. We find in Greenleaf on Evidence, 16th Edition, Section 461f this:

“A limitation here obtains which is practically identical with that enforced in the preceding topic, viz., that the proof of inconsistent (or self contradictory) statements cannot be made through other witnesses upon matters ‘collateral’ to the issue. The reasons of convenience requiring this rule are the same as those explained in the preceding section. The term ‘collateral’ is here of little service in testing a given offer of evidence; and a more careful and useful definition of it (as already explained in the preceding section) is, Could the fact, as to which the inconsistency is predicated, have been shown in evidence by other witnesses, independently of the inconsistency” citing *Attorney General v. Hitchcock*, 1 Exch. 99.

It will be seen therefore that the collateral rule applies as to collateral statements in the same manner as to collateral offenses.

Then to carry the search further we look to the decisions as to the propriety of admitting in evidence the opinion of a witness as to the guilt or innocence of the accused. The overwhelming weight of authority is to the effect that such evidence is not admissible. There is only one decision in the Federal courts on this matter. And that one decision is in the United States Court of Appeals for the District of Columbia—*Yeager v. United States*, 16 Appeals D. C. 356. The court in the *Ewing* case therefore overruled the *Yeager* case without so stating. And it seems strange indeed that in the original opinion not a word was said as to the *Yeager* case. Not once was it referred to. When the attention of the court was called to that fact in the petition

for rehearing (R. 125, 126) the opinion was amended to show *Yeager v. Yeager*, 16 Appeals D. C. 356 (at page 13). When the attention of the court was called to the fact that that was not the correct citation then the opinion was again amended to show *Yeager v. United States*, 16 Appeals D. C. 356.

In the *Yeager* case there was a prosecution for carnal knowledge and the father of the prosecutrix testified that in a conversation with the defendant concerning his daughter's condition he explained to defendant that she had missed her monthly period and defendant advised him to see a physician and not to pay any attention to women in the neighborhood. The witness denied having said to a third person that he thought it strange if defendant was guilty that he should have advised witness to obtain a physician. Objection was made by the government when the defense sought to show by the testimony of such third person that witness had made such a statement. The court of appeals said in the *Yeager* case:

"There was no error in sustaining the objection. The defendant had the benefit of the witness's statement of the conversation between them. Witness's opinion founded thereon, as to the guilt or innocence of the defendant, was not a fact for the consideration of the jury and hence could afford no foundation for his impeachment."

We submit that the *Yeager* case is decisive here.

For state cases bearing on this matter the following are cited:

People v. Stackhouse, 49 Mich. 76; 13 N. W. 364;

State v. Hazzard, 75 Wash. 5; 134 Pac. 514;

State v. Davidson, 9 S. D. 564; 70 N. W. 879;

Commonwealth v. Mooney, 110 Mass. 99;

Elizondo v. State, 130 Texas Cr. 393; 94 S. W. (2d)

457;

Shannon v. State, 118 Tex. Cr. 505; 38 S. W. (2d) 785;
Drake v. State, 29 Tex. (Ct. of Appeals) 269;
State v. Nave, 283 Mo. 35; 222 S. W. 744;
Tucker v. Graves, 17 Ala. App. 602; 88 Sou. 40;
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Denton v. Comm., 188 Ky. 30; 221 S. W. 202;
In re Eno's Will, 187 N. Y. S. 756; 196 App. Div. 131;
Norman v. Shipowners Stevedore Co., 59 Wash. 244;
 109 Pac. 1012;
Ryerson v. Inhabitants of Abington, 102 Mass. 526;
People v. Foglesong, 116 Mich. 556; 74 N. W. 730;
Jenkins v. State, 45 Tex. Cr. 173; 75 S. W. 312.

In *People v. Stackhouse*, 49 Mich. 76, 77; 13 N. W. 364, 365, the court said:

“The opinion or suspicions of the witness out of court, although inconsistent with the conclusion which the facts she testified to on the trial would warrant, cannot be made the basis of an impeachment. This is so firmly settled by the authorities that the question cannot be considered an open one”.

In *State v. Hazzard*, 75 Wash. 5; 134 Pac. 514, 519 the court said:

“ * * * In such a case the rule is that previous statements made by the witness as to a matter of opinion or a conclusion cannot be shown although they may tend to contradict inferences which might be drawn from the recital of the facts as given in the testimony of the witness during the examination in chief.”

In *People v. Foglesong*, 116 Mich. 556; 74 N. W. 730 the court held:

that evidence that a witness had expressed an opinion that his brother and a certain woman were guilty of improper conduct is not admissible to impeach his

testimony that he had never seen anything improper in their relations.

In *Norman v. Shipowners' Stevedore Co.*, 59 Wash. 244; 109 Pac. 1012; the court held

that where in an action for injuries to a servant, defendant's witness was on cross-examination asked a question calling for a conclusion as to the cause of the accident, and answered without objection being made and on redirect examination defendant asked the witness if he had not stated a different conclusion or opinion to defendant and C, which statement was denied, the defendant could not then call C and question him as to a statement by the witness of a different conclusion from that expressed on the stand, as such statements of opinion were clearly incompetent and did not come within the rule of showing contradictory statements made out of court.

In *Commonwealth v. Mooney*, 110 Mass. 99, 101 the court said:

"The witness * * * having testified to certain facts tending to prove the guilt of the defendant it was not competent for the defendant to show what opinion the witness may have had or expressed upon the merits of the case. The fact that he had an opinion that the defendant was innocent would not tend to contradict or impeach him. At most, it only shows the weight he gave to the facts testified to by him as tending to prove the defendant's guilt, which is for the jury exclusively, and upon which the opinion of witnesses is not competent".

In *Tucker v. Graves*, 17 Alabama App. 602; 88 Sou. 40, 41 the court said:

"In an action against a druggist for selling poison unlabeled in place of a harmless remedy, a physician, testifying in behalf of plaintiff, cannot be impeached by

evidence as to his statements concerning treatment, etc.”

In *State v. Nave*, 283 Mo. 35; 222 S. W. 744 the court held:

that to impeach a witness by prior contradictory statements they must be statements of fact pertinent to the issue, and not merely matters of opinion; facts which would be competent evidence independent of inconsistency with the witness' testimony; hence it was error to admit impeaching evidence that accused's father had previously stated in conversation in accused's absence, that he thought accused had taken the mules he was accused of stealing.

In *Jenkins v. State*, 45 Tex. Cr. 173; 75 S. W. 312 the court held:

that a witness in a criminal prosecution cannot be impeached as to his statements of his belief as to who committed the crime, though his belief may have been founded on statements of fact of another witness, as to which she is impeachable.

We say that the conclusion to be drawn from all these cases is that it is never permissible to receive in evidence the opinion of a witness as to the guilt or innocence of the accused. That is a function exclusively for the jury. And without doubt it applies with greater force in this case in that the witness in question (Miss Chamberlin) denied that she had expressed an opinion as to the guilt of petitioner. And it must not be overlooked that the record shows (89-91) that in such conversation the opinion was not stated. If such a rule of evidence is approved for the Federal courts then by the means of false testimony the prosecuting officials could bolster an otherwise weak case by the use of methods here employed. And in saying this we are not stating that the prosecuting officials in the *Ewing* case knew

that the testimony of the mother of the prosecutrix was false but we have the proposition that Miss Chamberlin herself denied expressing such an opinion and her version is corroborated by the record at pages (89-91). To sustain such a method of procedure carries with it the danger of consequences of the gravest nature.

It is urged that the matter being one of such importance and contravening the accepted rules of evidence that this Court should decide the matter so that Federal courts can be guided accordingly. As has already been pointed out there is only one Federal decision that is controlling and that case sustains the contention of petitioner. *Yeager v. United States*, 16 Appeals D. C. 356.

In the rules of this Court we find in Rule 38 (5) that the character of reasons for granting certiorari are indicated. In Rule 38 (5)b we find this:

“Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions. * * *”

“Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision”.

II.

A Witness Cannot Be Contradicted on a Collateral Matter.

Petitioner says that the matter under this heading has already been treated under the first point and will not be repeated here.

III.

When Is Error Prejudicial in a Criminal Trial?

A witness was called on behalf of the defendant and was questioned within certain limits by the petitioner. The

district attorney then went beyond the limits of cross-examination and asked this question (R. 115):

Q. On the 25th day of October, Saturday the 25th day of October, Saturday before this particular occurrence that he is being tried for here, didn't the defendant say to you, "Let's get some whiskey and go to the Whitestone and get some of the girls and have a party tonight?"

A. No, sir.

Q. He didn't say anything like that?

A. No, sir.

There was no justification for such a question and its only effect could have been to label petitioner as a man of immoral traits. While we are not unmindful that some of the recent cases have overturned some of the earlier decisions and hold that it is incumbent upon the complaining party to show that the error was in fact injurious yet we say that nothing is more satisfactory from a prosecutor's standpoint when trying an accused for grand larceny than to show that at some other time he expressed a desire to steal. The case of *Deery v. Cray*, 5 Wall. 795 still is logical and sound. In that case this court said:

"We concede that it is a sound principle that no judgment should be reversed in a Court of Error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights".

In *Williams v. United States*, 158 Federal 30 the court said:

"It is a rule of law in this jurisdiction, often repeated, that, when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, 'unless it appears beyond doubt that

the error did not and could not prejudice the rights of the party' ”.

In *Miller v. Territory of Oklahoma*, 149 Federal 330, the court said:

“The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to said suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury helped to make up the weight of the prosecution which resulted in the verdict of guilty”.

In *People v. Robinson*, 273 N. Y. 438; 8 N. W. (2nd) 25, the court said:

“Judges trained by years of experience to base decisions solely upon the competent evidence contained in the record are not always completely confident of their ability to disregard and remain uninfluenced by information, or even impression, conveyed to them dehors the record”.

And in this same connection and giving support to our allegation of misconduct on the part of the prosecuting officers, attention is called to page 39 of the record when in the questioning of prospective jurors there is injected in the case a statement that a supposed witness had been indicted for mailing obscene literature through the mail.

There was no basis whatever for the question and it could only have been done to create an atmosphere of hostility toward the petitioner.

The Failure to Make Objections and Take Exceptions in the Trial Court Should Not Affect This Petition.

Before concluding it is well to point out that the Chief Justice in the court below held that the opinion testimony was improper but said this in his concurring opinion.

“My concurrence in the result is because the record in this case shows that the testimony to which I have referred was given without objection or exception”.

It is of course most unfortunate that no objections were made or exceptions taken. However the trial judge did not consider this an obstacle when he said in his memorandum opinion:

“It is deemed proper by the court that all matters complained of as erroneous and prejudicial should be considered without respect to whether or not any objection had been made upon which to predicate such complaint U. S. C. A. Title 28, Section 391. This has been done, not only with respect to those matters discussed in this memorandum, but also all others which were mentioned in the motion, supplements and amendments thereto, affidavits, testimony and argument”. (Record 31 and 32).

It seems rather strange therefore that the trial judge did not penalize the petitioner because proper objection was not made and exception taken yet the appellate court did. See *Van Gorder v. United States*, 21 F. (2nd) 939 and *United States v. Dressler*, 112 F. (2d) 972.

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It will be seen that the Chief Justice said that opinion testimony was not admissible but he joined in the affirmance since there was no objection and exception and that the at-

torney perhaps felt that it was admissible. In this connection attention is invited to page 126 of the record wherein the only skilled practitioner in the criminal trial swears that it was improper.

Conclusion.

It is contended that the interests of justice will be served and the fairness of criminal trials will be safeguarded if the important question raised in this case is settled by this Court. Otherwise if the rule of evidence sanctioned by the court below and representing such a departure from the accepted and usual course of judicial proceedings is permitted to stand only confusion can result. The rule of evidence announced in this case will serve as a guide throughout the country and it will only be a brief period of time until this court will be required to settle the matter. We submit that this case is the appropriate means to accomplish this.

Wherefore it is respectfully submitted that the writ of certiorari should issue as prayed.

JAMES J. LAUGHLIN,
National Press Bldg.,
Washington, D. C.
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 110-123),¹ affirming the judgment of conviction, is not yet reported. The memorandum opinion of the district court denying petitioner's motion for a new trial is set forth at R. 29-67.

¹ Pursuant to stipulation (R. 135), the printed record consists of the appendices of the briefs filed in the court of appeals and the proceedings in that court. References to the original record of the entire proceedings, which has also been filed, will be designated "Tr."

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1942 (R. 124). The petition for rehearing, filed December 8, 1942 (R. 124), was denied by the court of appeals on December 11, 1942 (R. 133). The petition for a writ of certiorari was filed on January 18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether it was error to impeach a defense witness on cross-examination and through rebuttal testimony by showing that prior to the trial the witness had stated a belief in defendant's guilt, where the statement was coupled with a statement of an obligation nevertheless to be on defendant's side, and where the belief in guilt was inconsistent with the facts testified to by the witness.

2. Whether petitioner was prejudiced by the prosecutor's questions propounded on the examination of members of the jury panel and on cross-examination of a defense witness.

STATEMENT

On February 21, 1942, petitioner was convicted (R. 20, 21) in the United States District Court for the District of Columbia under a one-count indict-

ment (R. 1-2) which charged that he committed rape against one Betty Ruth Crandall in the District of Columbia on October 26, 1941. On June 30, 1942, he was sentenced to the penitentiary for a period of eight to twenty-four years (R. 22).

The pertinent testimony may be summarized as follows:

On October 12, 1941, the complaining witness, Betty Ruth Crandall, came to the District of Columbia from her home in Provo, Utah, to take a civil-service position with one of the Government agencies (Tr. 750). Upon her arrival, she went to the Whitestone Apartments to reside temporarily with Hester C. Chamberlin, a friend of long standing of her mother's (Tr. 1170, 1194-1195), who owned and managed the Whitestone jointly with petitioner (Tr. 752, 1057, 1262). While at the Whitestone, the witness occupied the bedroom of Miss Chamberlin's two-room apartment in the basement of the premises (Tr. 755), and Miss Chamberlin during this period occupied the front room of the apartment, known as the "pine room" (Tr. 1138-1139).

Around 12:30 a. m. on the night of October 25, 1941, Miss Crandall returned to the Whitestone with one Robert Payne, a tenant of the apartment, with whom she had three engagements during her stay there (Tr. 765, 768). After talking to Mr. Payne for a short time, she made her adieu and went to Miss Chamberlin's apartment, arriving there about 1:00 or 1:15 a. m. (Tr. 768, 769). In

the "pine room" of the apartment, she found Miss Chamberlin and petitioner (Tr. 769-770), whom she had seen approximately ten times since being introduced to him by Miss Chamberlin shortly after her arrival in Washington (Tr. 764). Both Miss Chamberlin and petitioner were drinking (Tr. 769-770, 1135-1136, 1274-1276). Petitioner was fully clothed and appeared to be normal, but Miss Chamberlin was attired in a nightgown and "looked so dopey and talked so strange" (Tr. 769, 770). After talking to Miss Crandall for a few minutes and offering her a cigarette and a drink, both of which were refused, petitioner left, assisting Miss Chamberlin from the room (Tr. 771-772). Miss Crandall then retired to the adjoining bedroom, and, having prepared for bed, locked the bedroom door and retired to bed (R. 69). The lock, though broken in one place, could be made to hold (Tr. 760, 1174). Twenty or thirty minutes later, petitioner, having broken in the door, entered the bedroom attired only in his underwear and proceeded, despite Miss Crandall's protests and by use of force and threats of death, to have sexual intercourse with her (R. 69-70, 72).

After he had completed his act of intercourse, petitioner took a sheet into the "pine room" and there washed it. When he brought the sheet back into the bedroom, he handed Miss Crandall a syringe and instructed her in the use of it, and she then went to the bathroom adjoining the "pine

room" and attempted to use it. Petitioner afterwards took the syringe from her and held it over the open flame of the gas stove in the "pine room." She then returned to her bed in the adjoining room at petitioner's order, where she stayed for the remainder of the night in the belief that petitioner had remained in the "pine room," thereby preventing her free exit from the bedroom (R. 70-72).

The testimony of the prosecutrix was corroborated by certain circumstances testified to by other witnesses: She told friends of the attack upon her within twelve hours of the time it was alleged to have occurred (Tr. 866-867, 871-872). Complaint was made to the police within twenty-four hours (Tr. 964-966). The lock on the bedroom door, when examined after the complaint had been made, showed two breaks, one of which appeared to be fresh (R. 81). She was extremely shaky and hysterical for at least twenty-four hours after the alleged attack (Tr. 866-867, 876, 885-886, 965, 997). Physical and medical evidence, outlined in the opinion below (R. 112), was also corroborative (Tr. 887-889, 947-948). When arrested, petitioner made an equivocal response to the prosecutrix's accusation (Tr. 1000) and admitted that he was in the apartment on the night of the alleged crime (R. 41-42).

Miss Chamberlin, on behalf of the petitioner, testified that about 12:45 a. m. of the night in question she and petitioner were in the "pine

room" working on accounts; she admitted that both of them were drinking (Tr. 1134-1136). Miss Crandall came in at approximately 1:30 a. m. and had a drink with them (Tr. 1136-1137, 1211). Petitioner left the room alone about ten minutes later (Tr. 1137). Miss Chamberlin then retired to bed in the "pine room" about 2:00 a. m. at which time Miss Crandall was in the adjoining bedroom (Tr. 1137-1138). Miss Chamberlin further testified that she was a light sleeper (Tr. 1181), and that noises in Miss Crandall's bedroom could be heard very plainly in the "pine room" (R. 73). No one could without her knowing it, and on that night no one did: (1) go from the "pine room" to the bedroom; (2) converse in the bedroom; (3) wash a sheet in the bathroom of the "pine room"; (4) fix and use a douche in the bathroom; (5) use the gas range in the "pine room"; (6) use force of any kind against the door between the "pine room" and the bedroom (R. 38-39).²

² Later petitioner testified in his own behalf that he had worked in the "pine room" of Miss Chamberlin's apartment until after 1:00 a. m., and a short time later called his home to inform his wife that he would spend the night at the Whitestone. Miss Crandall entered the room about 1:30 a. m. and had a drink with petitioner and Miss Chamberlin. Petitioner admitted that he and Miss Chamberlin had been drinking but denied that either of them was intoxicated. He further testified that around 3:00 a. m. he retired to a vacant room in the basement across the hall from the pine room, and categorically denied having intercourse with Miss Crandall (Tr. 1260-1294).

On cross-examination, the witness was questioned concerning a trip to Provo, Utah, and an interview there with Miss Crandall's mother. After Miss Chamberlin admitted the interview, she was interrogated as follows (R. 74):

Q. Now, in that conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say "Yes"?—A. No; she didn't.

Q. In that conversation didn't you say to her that Ewing was facing the electric chair and that you would have to be on his side?—A. No. I told her he was facing the electric chair. I told her I would have to tell my story as I knew it irrespective of who it affected.

After the petitioner had rested his case in chief, Mrs. Afton B. Crandall, mother of the prosecutrix, testified without objection^a as follows (R. 75):

^a Petitioner was represented at the trial by H. L. McCormick, C. H. Smith, and Roy S. Parsons, counsel of his own choosing; and petitioner's son, Lowell Ewing, a member of the local bar since 1937, while not counsel of record, advised with the defendant and with counsel in the preparation for trial (R. 47-48). His present counsel did not enter the case until after the motion for new trial had been filed (R. 21). After making his appearance in the case, present counsel filed an amendment (R. 27) to the motion for new trial in which he set forth, in the support of the motion, that petitioner had been denied effective assistance of counsel. Later, petitioner filed with the trial court an affidavit (Tr. 130-143) in which he charged that trial counsel McCormick had fraudulently and deliberately attempted to lose the case. Neither of these two contentions is now urged, but among

Q. On that occasion [i. e., Miss Chamberlin's conversation with the witness at Provo, Utah] did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter" and did she say, "I do believe it"?—A. Yes; she did.

Q. Did she further say on that occasion "He is facing the electric chair and I have got to be on his side?"—A. Yes.

ARGUMENT

I

Petitioner contends that the cross-examination of Miss Chamberlin concerned a collateral matter, and that, therefore, the Government was bound by her answer (Pet. 11, 15, 20). He contends, further, that the subject matter of this cross-examination

other matters complained of in the affidavit was the failure of trial counsel to ask for a mistrial upon Mrs. Crandall's testimony in contradiction of Miss Chamberlin (Tr. 138). McCormick and two other trial counsel filed affidavits contradicting petitioner's charge of fraud. In the affidavit which he filed, Mr. Parsons explained why a mistrial was not asked for in the following language (R. 82):

"It was anticipated prior to the trial that Afton Crandall would appear, and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias, or personal feeling on the part of Hester Chamberlin, a defense witness. The question was fully discussed among all counsel and with Lowell Ewing, and the judgment of counsel was that such testimony was not inadmissible for that purpose * * *."

and of the testimony of Mrs. Crandall in contradiction of Miss Chamberlin was inadmissible because it concerned the opinion of a witness as to the guilt or innocence of petitioner (Pet. 10, 15-20).

The conversation between Miss Chamberlin and Mrs. Crandall which the Government first sought to establish on the cross-examination of Miss Chamberlin, and then by the testimony of Mrs. Crandall, plainly showed that Miss Chamberlin was biased in favor of the petitioner. Testimony that she said to Mrs. Crandall, a friend of long standing, that, though she believed petitioner was guilty of an offense against Mrs. Crandall's daughter, "I have got to be on" the side of her daughter's despoiler because he faced the electric chair, was obviously evidence of bias. When to this statement there is added the fact that Miss Chamberlin testified, as of her own direct knowledge, to a state of facts which, if true, proved the innocence of the petitioner, her bias would seem to have been plainly shown if the jury believed the testimony of Mrs. Crandall, as it was entitled to do.

Since the cross-examination of Miss Chamberlin was directed to the disclosure of her bias in favor of the petitioner, the very authorities relied upon by petitioner (Pet. 15) demonstrate that it did not concern a "collateral" matter in the sense that the Government was concluded by the answer of the witness. Thus, in *Attorney-General v.*

Hitchcock, 1 Exch. 91 (1847), both Pollock, C. B., and Alderson, B., were clearly of the opinion (and Rolfe, B., said nothing to the contrary) that the bias, hostility and want of an impartial mind on the part of a witness were not collateral matters concerning which a cross-examiner is bound by the answer of a witness. And in 1 Greenleaf on *Evidence* (16th ed., 1899), § 461f, the same view is taken.* Moreover, the authorities cited by petitioner, insofar as they bear on the point for which we have borrowed them, are supported by the federal cases and uniformly by the leading treatises on evidence. *United States v. Schindler*, 10 Fed. 547, 549 (C. C. S. D. N. Y.); *Hoagland v. Canfield*, 160 Fed. 146, 170-171 (C. C. S. D. N. Y.); *Woods v. United States*, 279 Fed. 706, 711 (C. C. A. 4); *Farkas v. United States*, 2 F. (2d) 644, 647 (C. C. A. 6); *Sprinkle v. Davis*, 111 F. (2d) 925 (C. C. A. 4); *United States v. Glasser*, 116 F. (d) 690, 702 (C. C. A. 7), reversed on other grounds,

* "Another mode of discrediting a witness is by showing (either through cross-examination or by other witnesses) that the witness has at another time stated the opposite of what he now states * * *. A limitation here obtains * * *, viz., that the proof of inconsistent (or self-contradictory) statements cannot be made through other witnesses upon matters 'collateral' to the issue. * * * As pointed out * * * the orthodox doctrine regards facts showing bias or corruption as not collateral; and this doctrine is generally accepted in this country * * *" (Op. cit. *supra*, p. 590 *et seq.*).

315 U. S. 60; see *Wills v. Russell*, 100 U. S. 621, 625; *United States v. Dickinson*, 25 Fed. Cas. (No. 14958) 850, 851 (C. C. D. Ohio); III Wigmore, *Evidence* (3d ed., 1940), §§ 948, 950, 1003-1005, 1020-1022; III Wharton, *Criminal Evidence* (11th ed., 1935), §§ 1346, 1417; Underhill, *Criminal Evidence* (4th ed., 1935), §§ 401, 437; III Jones, *Evidence in Civil Cases* (4th ed., 1938), § 828.

Apart from the matter of bias, the cross-examination of Miss Chamberlin did not, for a further reason, concern a collateral matter as to which the Government was bound by her answer. It is settled that a prior statement of a witness, inconsistent with his testimony to facts in issue, is not a collateral matter on which his answer to a question by the cross-examiner is conclusive, and that the cross-examiner may, to impeach the witness, prove by contradictory testimony that the prior inconsistent statement was made. *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142, 147 (C. C. A. 8). The cross-examination of Miss Chamberlin would seem to fall within this rule. Her prior statement expressing the belief that petitioner was guilty, though expressed in the form of opinion, was contrary in a factual sense to facts at issue to which she herself testified on direct examination. Upon her testimonial assertion of knowledge of the facts in issue which was irreconcilable with her prior belief, her statement of that belief was given a factual content from the standpoint of admissibility for testi-

monial impeachment through contradiction. *Pierce v. Sanden*, 29 F. (2d) 87, 90-91 (C. C. A. 8);⁵ *Holder v. State*, 119 Tenn. 178, 217-227 (1907); *Bates v. State*, 4 Ga. App. 486, 489-491 (1908); *State v. Matheson*, 130 Iowa 440, 447-448 (1906); *State v. Exum*, 138 N. C. 599, 609-611 (1905); *Commonwealth v. Wood*, 111 Mass. 408, 410 (1873); *State v. Kingsbury*, 58 Me. 238, 240-243 (1870); *Lowe v. State*, 118 Wis. 641 (1903); *Mayer v. People*, 80 N. Y. 364 (1880); III Wigmore, *Evidence* (3d ed., 1940), § 1041.

Petitioner insists that the testimony was inadmissible because it was couched in the form of an opinion of a witness as to the guilt of the accused. The cases just cited support the admissibility of the testimony. It is nevertheless true that there is a dearth of reported authority on the point in the federal courts, and there are some general expressions of inadmissibility in certain state cases. See the authorities cited in III Wigmore, *supra*, Section 1041. Our position, that such testimony should be admitted in the circumstances disclosed in the present case, is founded on the reasoning in the authorities already cited. The statement of Miss Chamberlin here in question, though couched in part in the form of belief in petitioner's guilt, showed when taken as a whole that she was biased

⁵ "The statement of the witness, although a general conclusion ['You are not to blame'], tended to contradict his testimony as to particular facts which indicated a contrary conclusion" (p. 91). Exclusion of the evidence was held reversible error.

in petitioner's favor, and made her testimony untrustworthy; so at least the jury was entitled to conclude. Moreover, the belief in petitioner's guilt was inconsistent with her testimony in chief, which tended directly to negative the possibility of his guilt. The cases cited by petitioner (Pet. 15-20) do not reject the admissibility of such evidence in these circumstances. In none of those cases was the previously expressed opinion indicative of bias⁶ or of knowledge of facts in issue later testimonially asserted which are irreconcilable with the prior opinion.⁷

Finally, petitioner states (Pet. 10) that the decision of the court below is fraught "with the gravest danger." By this is apparently meant that the decision of the majority permits the use of opinion evidence as a substantive evidence of a defendant's guilt in a criminal case. The majority opinion, however, is at pains to point out that the ruling in respect of the cross-examination of Miss Chamberlin and the contradictory testimony of Mrs. Crandall is "limited to the facts of this case, and similar situations." The opinion had already explained the distinctive features of the issue as presented in the instant case (R. 116-122).

⁶ The only case cited by petitioner which gives any consideration to a prior opinion indicating bias states in a dictum that such an opinion can be used to contradict a witness. *Drake v. State*, 29 Tex. Cr. 265, 277 (1890).

⁷ *Yeager v. United States*, 16 App. D. C. 356, 359 (1900), which the petitioner states the court below in effect overruled in the instant case (Pet. 15-16), is clearly distinguishable on the grounds stated in the text.

Although not stressed by petitioner, a word should be added concerning *Shepard v. United States*, 290 U. S. 96, 104, cited in the concurring opinion to show that Mrs. Crandall's testimony should have been excluded, if objected to, on the ground that it was impossible for the jury to avoid relying on it as substantive evidence. In the *Shepard* case, the defendant was charged with the murder of his wife, and the Government introduced, as substantive evidence of Shepard's guilt, testimony that his wife had said, "Dr. Shepard has poisoned me." On appeal, and in this Court, the Government sought to justify the admission of this evidence on the ground that it went to disprove the testimony of defense witnesses that Mrs. Shepard had stated that she had no wish to live and that some day she expected to take her life. This Court ruled, however, that even if the evidence had been introduced at the trial, with a proper limiting instruction, solely to contradict defense witnesses, it would still have been inadmissible; its tenuous logical relevance to the Government's case in this aspect was outweighed by the damage it would do the defendant's case, coming as the accusation of a wife from the grave. In the present case, however, the evidence in question would naturally be taken as impeaching the credibility of Miss Chamberlin, and if an instruction had been thought desirable it could, on request, have been readily framed and understood. In view of the

relevance of the testimony and the great importance of the issue of Miss Chamberlin's credibility, the "risk of confusion" did not "upset the balance of advantage" (290 U. S. at 104).^{*}

II

A. Petitioner next contends (Pet. 6, 20-23) that he was prejudiced by the cross-examination of his witness Simmons. The substance of the question was whether petitioner on the night of the crime suggested to the witness that they "get some whiskey and go to the Whitestone and get some of the girls and have a party." Simmons twice answered the question in the negative, and the matter was not pursued further (R. 4). The question asked Simmons was, we think, a proper question to disclose his personal relations with petitioner for the purpose of permitting the jury to assess his credibility. *Alford v. United States*, 282 U. S. 687, 691-692. However, even if the evidence sought to be elicited by the question was inadmissible, the mere asking of the question was not prejudicial. Particularly in the light of the other evidence in the case, it cannot fairly be assumed that the jury gave the question, twice

^{*} The trial judge (Morris, J.) stated (R. 34): "There remains one further comment to be made in this connection. The testimony of Mrs. Crandall was clearly for impeachment purposes only. It was obviously so considered and so treated in argument of counsel."

denied and then dropped, the weight of substantive evidence of petitioner's immorality and intent to commit rape.

B. Petitioner also contends (Pet. 3, 6, 22-23) that he was prejudiced by the prosecutor's inquiry, made during the examination of the jury panel, whether any of the prospective jurors were acquainted with one Clarence D. Cunningham who had been "indicted for sending obscene literature through the mail" (Tr. 639-640). Neither the context of the statement nor the circumstances under which it was made show that it was designed to prejudice petitioner. And, in view of the fact that Cunningham was not called as a witness and that no connection between him and petitioner was shown, or that petitioner had intended to call him as a witness, we think that it is sheer speculation to suppose that any "atmosphere of hostility" (Pet. 23) was created by the statement.⁹

⁹ The inherent weakness of petitioner's complaint as to the prosecutor's questions is demonstrated by the fact that no objection was taken at the trial and that neither point was thought to be of enough importance to be incorporated in the motion for new trial (R. 22-27) or in the assignment of errors (R. 27). It is true that in his affidavit charging fraud on the part of trial counsel (Tr. 135), petitioner complained of the fact that no objections were made. Trial counsel Smith in his counteraffidavit stated, however, that the witness Simmons appeared to be intoxicated and that the vigorous cross-examination by the Government was not surprising. He also stated that upon petitioner's demanding that he "do something to protect the witness," he started to get to his feet, but that at that point the Government "dropped the point, and the matter was closed" (Tr. 123).

CONCLUSION

While the question whether proof of a prior statement of opinion, inconsistent with testimony given at the trial, is, in the abstract, not unimportant, that question is not, we believe, presented in this case in circumstances calling for further review. The opinion here was a part of a statement showing bias and was also of factual content inconsistent with facts stated on the stand. We therefore respectfully submit the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
W. V. T. JUSTIS,
Attorneys.

FEBRUARY 1943.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR
WRIT OF HABEAS CORPUS

JAMES J. LAUGHAN,
Counsel for Petitioner.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

1894

TO THE SECRETARY OF THE INTERIOR

FROM THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION OF THE SENATE PASSED MAY 10, 1894

RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES

11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**PETITION FOR REHEARING OF APPLICATION FOR
WRIT OF CERTIORARI.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Comes now, Orman W. Ewing, and respectfully petitions this Honorable Court for a re-consideration of his petition for a writ of certiorari to review the judgment of the District Court of the United States for the District of Columbia as affirmed by the United States Court of Appeals for the District of Columbia.

Petition for certiorari was denied on March 15th, 1943.

The petitioner is confined at the District Jail, Washington, D. C.

Petitioner is not unmindful that careful consideration was given to his petition for certiorari. However, he is so convinced that there was a denial of due process in this case that he asks the Court to consider anew and re-inquire into the question of evidence involved.

Summary Statement of Matter Involved.

Petitioner was indicted on November 4, 1941, for the crime of rape. The offense was alleged to have been committed on October 26, 1941, and the petitioner was arrested on the night of October 27th. At the time he was charged with this offense petitioner was 57 years of age. He was denied bond and has been confined in jail since his arrest. After a trial before the Honorable James W. Morris and a jury in the United States District Court for the District of Columbia, petitioner was convicted. The judgment and sentence of the Court was confinement in the penitentiary for a period of 8 to 24 years (R. 22). The court below affirmed the judgment and sentence (R. 124). Petitioner has at all times denied the charge and has consistently maintained his innocence.

During the course of the trial, a defense witness was asked questions on cross-examination about a visit made by this witness to the home of the mother of the complaining witness in Utah. The interrogation developed that the witness was a friend of the mother of the complaining witness and the government sought to establish that the purpose of the visit was to discuss the subject matter of the pending trial. On direct examination, there was no evidence developed with respect to this visit. However, on cross examination, the government asked:

“Q. Now, in this conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say, yes?

“No, she didn't” (R. 32).

Notwithstanding the aforesaid denial, the government called as the last witness in the case, in rebuttal, the mother of the complaining witness and, after redeveloping the visit to Utah, the following colloquy occurred:

"Q. On that occasion, did you look at Miss Chamberlin and point and say this: 'Do you believe that Mr. Ewing is guilty of raping my daughter,' and did she say, 'I do believe it!'"

"A. Yes, she did.

"Q. Did she further say on that occasion, 'He is facing the electric chair, and I have got to be on his side?'"

"A. Yes (R. 32, 33)."

It is with respect to this line of testimony, and the propriety thereof, that the basic question of law underlying this petition is raised. Error was assigned and the court below considered the question. The majority concluded that the admissibility in evidence of the opinion of the witness as to the guilt or innocence of the accused was proper. The Chief Justice disagreed.

Petitioner protests with all possible vigor such a departure from the accepted and orderly course of judicial proceeding. There is ample justification for this Court reviewing petitioner's conviction due to the supervisory power exercised over Federal Courts. This principle was very clearly set forth in the case of *McNabb v. United States*, decided March 1, 1943 (No. 25). In fact in the *McNabb* case this Court stated:

"And in formulating such rules of evidence for Federal criminal trials the Court has been guided by considerations of justice not limited to the stock canons of evidentiary relevance."

However, this case goes further. The Court of Appeals affirmed this conviction under a mis-statement of facts. It was the belief of the Court of Appeals that the objectionable

matter complained of had been deemed proper and entirely admissible. However, we say that a fraud has been committed upon the Court and this Court.

In the majority opinion in the Court of Appeals we find this:

“Finally from what has been said it appears there was no basis for the charge of incompetency made against the trial attorneys in connection with this assignment of alleged error. The record shows they regarded this inquiry as proper, and therefore made no objection. They investigated the law, and the result has justified their judgment.”

In the separate concurring opinion, the Chief Justice of the Court of Appeals said this:

“Appellant was represented by prominent counsel of his own selection. For reasons satisfactory to themselves they allowed this evidence to be given without protest.”

There appears in the government's opposition to the petition for certiorari, at page 8, the following:

“It was anticipated previous to the trial that Afton Crandall would appear and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias, or personal feeling on the part of Hester Chamberlin as a defense witness. The question was fully discussed among all counsel and with Lowell H. Ewing and the judgment was that such testimony was not inadmissible for that purpose.”

This is taken from affidavit filed by one Roy S. Parsons, one of the attorneys present during the criminal trial of petitioner.

As a matter of fact, there was no such conference.

The petitioner was represented by only one attorney experienced in criminal procedure, Charles Henry Smith,

Esq. of Alexandria, Virginia. Neither Mr. McCormick, or Mr. Parsons, had any experience with criminal procedure. Therefore, it becomes significant to find that Charles Henry Smith makes oath to the fact that there was no such conference. His affidavit is as follows:

"STATE OF VIRGINIA,

City of Alexandria, To-wit:

"I, Charles Henry Smith, being first duly sworn, makes oath as follows:

"I was one of counsel for the defendant in the trial of the case of United States *v.* Orman W. Ewing in the United States District Court for the District of Columbia, at which trial Mr. Ewing was found guilty by the jury; I have had no connection with the case whatsoever after the verdict.

"Recently it has been called to my attention that a statement or affidavit filed in the case in some connection which I do not fully understand, by Mr. Roy S. Parsons, stated as follows:

'It was anticipated previous to the trial that Afton Crandall would appear, and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias or personal feeling on the part of Hester Chamberlin as a defense witness. The question was fully discussed among all counsel and with Lowell H. Ewing and the judgment was that such testimony was not inadmissible for that purpose.'

"I also understand that it has been said by either Mr. Parsons or some one else that when the mother of the prosecutrix took the stand and made a certain statement in answer to a leading question by government counsel that Hester Chamberlin admitted to her that she thought the defendant, Ewing, was guilty, had been discussed by counsel and that we agreed that it was admissible testimony.

"No such decision was ever reached by me nor was any conference ever held with me whereby it was determined that such testimony was admissible. To begin with, I did not know that the witness, Afton Crandall, was going to testify. I had heard only incidentally that she was present in the court room during the trial. Considering the fact that all witnesses had been excluded under the rule of the Court, I naturally assumed that this witness would not testify. When she was called to the witness stand it was late one afternoon after a very strenuous day when I was quite ill, and was in attendance on the Court against my physician's advice. The question was asked and the answer given so suddenly that I must frankly state that I did not fully appreciate what had happened. I have never agreed that such testimony was admissible for any purpose and I believe now, as I believed then, that it was prejudicial to the highest degree, and that it had tremendous effect on the jury. It is true that I did not move for a mis-trial at the time nor did I register any objection. The only explanation I have for not doing so is the fact that I was not well, I was highly nervous due to an elevated blood pressure and extreme hypertension. I recall vaguely some question arising as to whether we should put Martha Taylor, the sister of Hester Chamberlin, on the stand to rebut this damaging statement made by the witness, Afton Crandall, and I did say at that time that I thought there was a strong possibility if we undertook to rebut the statement, we would waive any right we had as to the prejudicial nature and character of the testimony. I thought then and think now that this testimony was inadmissible and damning in its effect on the defendant's case.

(S.) Charles Henry Smith."

"Subscribed and sworn to before me, the undersigned notary public, in and for the State and City aforesaid, this 2nd day of April, 1943.

[SEAL.]

"ALICE R. BAKER,
Notary Public.

My Commission expires October 14th, 1946."

Therefore, if the Trial Court was satisfied there was no such conference, it is believed that a motion for a new trial would have been granted. We are also of the belief that if the Court of Appeals had been satisfied there was no such conference petitioner's conviction would have been reversed. *We are justified, therefore, in saying that a fraud has been practiced on this Court and the Court of Appeals as well as the District Court.*

We are not unmindful of the obstacles confronting us in trying to correct and rectify this situation. It goes without saying that this Court, maintaining, as it does, its supervision over lower Federal courts, has the right and the power to extricate the petitioner from this legal entanglement, not of his making, and, as this Court has said, as it did in the *McNabb* case, that in formulating such rules of evidence for Federal criminal trials, the Court "has been guided by considerations of justice not limited to the stock canons of evidentiary relevance."

It would seem that the language of Hon. Josiah A. Van Orsdel in the case of *Darby v. Montgomery County National Bank*, 63 App. D. C. 31 (73 F. 2d, 181) has application here:

"Can it be that justice is so blind that an insignificant technical error estops a court of justice from extending the relief here so convincingly demanded."

And again, in the same case, Honorable William Hitz dissenting, had this to say:

“This is putting too high a value on taking two bites of a cherry, and the denial of a review here of a judgment acknowledged to be wrong because the trial Judge and counsel in a common effort to dispatch business, permitted a futile formula of words, is to sacrifice the substance of justice to the shadow.”

It is clear that a great injustice has been done in this case. We now appeal to this Court to correct this injustice.

If the Court has been imposed upon, and a fraud practiced upon the Court, clearly any investigation will show that the situation is as we have recited in this brief.

No judgment of conviction wherein the accused is deprived of his liberty should ever be sustained when it rests upon such an unstable foundation as does the conviction in this case.

In view of the circumstances we petition this Court to grant a re-hearing.

Respectfully submitted,

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.
Counsel for Petitioner.

This petition for rehearing is filed in good and not for purposes of delay.

JAMES J. LAUGHLIN,
Counsel for Petitioner.

